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JAN 18 10 19 AM '00

January 14, 2000

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Susan Kay, Esq.
Office of General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: MUR 4947: Kemp for Vice President

Dear Ms. Kay:

This letter is in response to the letter from Chairman Scott Thomas, dated December 6, 1999, ("Reason to Believe Letter"). The Letter informed me that the Commission found reason to believe that the Kemp for Vice President Committee ("the Committee"), and I as treasurer, violated 2 U.S.C. § 441a and 11 C.F.R. § 110.1(b)(3)(i) when the Committee transferred \$100,000 to the National Republican Senatorial Committee ("NRSC") in October of 1996. As a result of this finding, the Commission included a Conciliation Agreement

Short Answer

I am surprised and disappointed that this issue resulted in an Audit finding, and now in an enforcement action. As I have explained to the Commission in various ways and contexts, when the Committee received contributions in August - October, 1996, I was still raising funds for anticipated debt. Once it was clear that there would be fewer expenses than I expected, I transferred most of the Committee's excess funds to the NRSC. I do not believe either of these actions was in violation of the election laws. Further, as a result of this transfer and the payment of winding down costs, the Committee has virtually no remaining funds

Background and Analysis

The Commission found reason to believe that the Committee violated 11 C.F.R. § 110.1(b)(3)(i). This section states that if contributions are received after the designated election and are known to exceed net debts outstanding from such election, the contributions must be returned, refunded, or redesignated. Thus, the Committee could only have violated § 110.1(b)(3)(i) if it knowingly received and accepted contributions after it knew it had obtained sufficient funds to pay all of its obligations.

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This allegation was raised by Audit staff with the Committee in the Exit Conference Memorandum On Kemp For Vice President, dated August 24, 1998, as well as at an April 21, 1998 Exit Conference. The Committee reviewed this and other issues in detail and responded to the Audit staff in memoranda dated October 26, 1998, and May 1, 1998, respectively. I stand by these responses and by my affidavit, dated April 29, 1998 (submitted as Attachment 4 to the Committee's May 1, 1998 response and as reaffirmed by my affidavit dated October 24, 1999, submitted as Exhibit 1 to the Committee's October 26, 1998 response). The veracity of my affidavit has never been challenged by the Audit or General Counsel's staff. I therefore cannot understand why my affidavit is not dispositive of this question. It states in relevant part:

We had to operate on guesstimates of actual expenditures, and were legally responsible for all costs actually incurred on behalf of Jack Kemp at the Convention prior to his nomination, whether or not they were authorized or budgeted in advance. At no time did I intentionally raise any contributions for the Kemp for Vice President Committee beyond my reasonable expectations of what our budget would require. My goal in post-Convention fundraising was to ensure that the Committee did not end with a debt, in the face of uncertain and ever-increasing estimates of costs incurred. Based on our estimates of over \$500,000 in expenses, we continued to accept contributions into October. It was only towards the end of that month as all of the final bills were accounted for, that it became clear that the Committee's bills would not be as high as we had feared, thereby leaving the Committee with some excess funds already on hand.

The Factual and Legal Analysis quotes this passage, but then makes no further reference to its content or import. That omission is unfortunate because it is the only record evidence of the Committee's intent and understanding, which is the key issue under 11 C.F.R. § 110.1(b)(3)(i).¹ To be clear, although the contributions were received by the Committee after the election, when they were received they were not in excess of the expected net debts outstanding. Instead, these contributions were received to pay off existing and anticipated forthcoming obligations, as determined by my periodically adjusted calculations. As such, the Committee's actions were not in violation of § 110.1(b)(3)(i), but rather were in compliance with § 113.2(c). Nonetheless, I will take this opportunity to again briefly summarize why the

¹ The only clue I could find that might explain the General Counsel staff's reluctance to rely on my affidavit is found in the Factual and Legal Analysis (at 4), "The Committee originally told the Audit staff that the treasurer had not kept track of KVP's debt position and that no workpapers were available for review." "The Committee" can only mean Amy Gilbert, an accountant that the Committee hired after the Republican National Convention ended to help us with FEC reports and who the Audit staff consulted during the audit process. I have attached Ms. Gilbert's affidavit as Attachment 1 to address this mischaracterization of the Committee's actions and procedures.

Commission should find that the Committee permissively received and retained its contributions and properly transferred \$100,000 of its excess campaign funds to the NRSC.

Sections 110.1(b)(3)(ii) and (iii) of the Commission's regulations make clear that "contributions [which] do not exceed the adjusted amount of net debts outstanding on the date the contribution[s are] received" are not subject to § 110.1(b)(3) (emphasis added). In addition, § 110.1(b)(3)(i) explains that it is reserved for contributions made after the election and in excess of the expected net debts outstanding. "Excess campaign funds" are defined as amounts received by a candidate as contributions which he or she determines are in excess of any amount necessary to defray his or her campaign expenditures." FEC Advisory Opinion 1990-2, Fed. Election Camp. Fin. Guide (CCH) ¶ 5979 (1990) (citing 2 U.S.C. § 439a; 11 C.F.R. § 113.1(e); 11 C.F.R. § 113.2(c)).

As I explained in my affidavit, it was not until the end of October, as most of the bills were accounted for and I had recalculated the amount of net debts outstanding, that I first realized that the debts would not be as large as I had feared. This is now confirmed by Amy Gilbert (on whom the Audit staff was apparently erroneously relying for a contrary view) in her sworn affidavit, submitted as part of this response. Once it was clear the anticipated debts would be covered by the funds on hand, the Committee ceased soliciting contributions and began considering what it should do with its excess campaign funds.² The Committee was aware that under federal law the Committee could transfer its excess campaign funds "without limitation to any national, State, or local committee of any political party." *Id.* Therefore, the Committee chose to transfer \$100,000 to the NRSC.

Conclusion

Upon closer examination of the factual record, the Commission should find that (1) the Committee permissibly received and retained contributions during the period that it estimated an existing debt; (2) some of these funds were thereafter determined to be excess campaign funds; and (3) these excess campaign funds were transferred to a party committee in accordance with the Act, Commission regulations, and Advisory Opinions. Once those findings are made, I respectfully urge the Commission to dismiss this Matter.

Sincerely,



Kirk Clinkenbeard

² Of course, even after I had determined that the Committee had excess funds and after the Committee had transferred funds to the NRSC, the Committee continued to receive new, previously unaccounted for, bills including legal, accounting, hotel, and telecommunications bills. I had anticipated that the Committee would continue to receive additional invoices and had accordingly kept a (now depleted) cash reserve to cover any late arriving bills.


GILBERT & WOLFAND, P.C.
Certified Public Accountants

2201 WISCONSIN AVENUE, N.W. • WASHINGTON, D.C. 20007
(202) 342-6000 • FAX (202) 333-6116

Affidavit of Amy C. Gilbert

1. My name is Amy C. Gilbert. I am a certified public accountant with Gilbert & Wolfand, P.C. in Washington, D.C.
2. Gilbert & Wolfand, P.C. was hired by the Kemp for Vice President Committee to assist the Committee in preparing its FEC reports. In addition, we made the deposits for cash receipts and prepared monthly bank reconciliations.
3. I have reviewed the Factual and Legal Analysis. I am concerned that the Audit staff did not fully understand my limited participation in the financial operations. The Factual and Legal Analysis states (at 4), "The Committee originally told the Audit staff that the treasurer had not kept track of KVP's debt position and that no workpapers were available for review." To clarify for the record, I did not have in my possession, nor was I aware of, any specific debt schedule, nor did I monitor cash flow. However, I was aware that the treasurer, Kirk Clinkenbeard, was monitoring cashflow, and accordingly, this would have involved both cash receipts and cash disbursements, as well as managing ongoing outstanding vendor debts. This monitoring of cashflow, by its very nature, includes the monitoring of debt.
4. My belief that Mr. Clinkenbeard was monitoring the debt derived from our continual discussions regarding cash receipts and cash disbursements, in which Mr. Clinkenbeard communicated his concern regarding whether the Committee would have sufficient funds to pay off its obligations. Accordingly, Mr. Clinkenbeard would discuss his ongoing effort to solicit and collect contributions for the Committee. New vendor invoices continued to come into the Committee well into November 1996, thus adding to the Committee's expenses. As the debts began to diminish, Mr. Clinkenbeard's concern for raising more contributions subsided in our discussions.
5. I declare under penalty of perjury that the foregoing is true and correct.

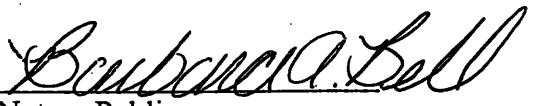
6. Executed on 1.13.00


Signed

Washington, DC

I am a notary public in Washington, DC and my commission expires: 10/31/2004.
THIS INSTRUMENT was acknowledged before me on 01/13/2000 by Amy C. Gilbert, who is personally known to me or who has produced identification and who did take an oath.

Notary Seal

Signature: 

Notary Public

Printed Name: Barbara A. Bell

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